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In The

Supreme Court of the United States

October Term, 1995

ROBERT W. HOWARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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69 pp

QUESTIONS PRESENTED

WHETHER THE DEPRIVATION OF ROBERT HOWARD'S PASSPORT WITHOUT NOTICE OR A HEARING WAS A VIOLATION OF HIS DUE PROCESS RIGHTS UNDER THE FIFTH AMENDMENT AND WHETHER EVIDENCE DERIVED THEREAFTER FROM ROBERT HOWARD DURING HIS DETENTION AND RETURN TO THE UNITED STATES SHOULD HAVE BEEN SUPPRESSED AT TRIAL AS THE FRUITS OF THE POISONOUS TREE.

WHETHER THE COURT'S FAILURE TO GRANT MR. HOWARD'S MOTION TO STRIKE THE GOVERNMENT'S THIRD BILL OF PARTICULARS, WHICH ADDED A DRUG NOT ALLEGED IN THE GRAND JURY'S INDICTMENT, CONSTRUCTIVELY AMENDED THE INDICTMENT THEREBY REQUIRING THAT MR. HOWARD'S CONVICTION BE REVERSED.

WHETHER THE DISTRICT COURT'S IMPOSITION OF A TWO MILLION DOLLAR FINE CONSTITUTED AN EXCESSIVE FINE AND AN ABUSE OF POWER IN VIOLATION OF THE EIGHTH AMENDMENT.

WHETHER THE AMBIGUITIES IN THE SENTENCING GUIDELINES REGARDING THE TREATMENT OF THE VARIOUS FORMS OF METHAMPHETAMINE ARE SO COMPLEX THAT THEY VIOLATE TRADITIONAL DUE PROCESS NOTICE STANDARDS AS TO WHICH LEVEL OF PUNISHMENT ATTACHES TO WHICH CONDUCT.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Robert W. Howard respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Eleventh Circuit entered March 14, 1996.

OPINIONS BELOW

District Court Judgment affirmed on March 14, 1996 without a written opinion, pursuant to Eleventh Circuit Rule 36-1.

JURISDICTION

The opinion of the Eleventh Circuit was entered on March 14, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment V.

U.S. Constitution, Amendment VIII.

22 Code of Federal Regulations §§ 51.70(a)(1), 51.72, 51.75 and 51.81.

STATEMENT OF THE CASE

Robert Winford Howard returned to Manila in the Philippines in December, 1992. He had visited the Philippines on multiple occasions in the past, most recently in January 1992 when he had won an international sporting event which had made him a celebrity among the Philippine people. Seven months after he returned to Manila and unbeknownst to him on July 7, 1993 he was charged in a three count indictment returned in the United States District Court for the Northern District of Georgia. On July 9, 1993, a warrant for Mr. Howard's arrest was issued.

Upon request of the Department of Justice in a letter dated January 6, 1994, the Department of State unilaterally and summarily revoked Mr. Howard's passport without notice or a hearing. Mr. Howard had relied upon his passport to pursue legitimate business interests in the Philippines and had a genuine commercial as well as personal interest in defending the validity of his passport. Mr. Howard was unexpectedly detained three weeks later on January 28, 1994, after the Filipino government had been informed that Mr. Howard no longer possessed a valid United States passport and was therefore subject to deportation.

Mr. Howard was taken into custody at a public sporting event. He was held in the Manila offices of the National Bureau of Investigation and then at the Immigration Service office over a period of two days. During this time Mr. Howard was given written notice that his passport had been revoked. He requested information concerning the procedure for obtaining a hearing. He was

told that he could be heard only after he was forcibly returned to the United States. He was given no opportunity to be heard or to contest the revocation of his passport while in the Philippines.

Mr. Howard was returned to the United States on January 30, 1994.

A superseding indictment was returned on June 29, 1994 charging him in three counts with participating in conspiracy to distribute marijuana, methamphetamine, and cocaine.

On January 20, 1995, the Friday before the trial began on January 23, 1995, a Third Bill of Particulars was filed by the government. This Bill of Particulars added amphetamine, a drug not alleged by the grand jury in the indictment, and specified that at least 125 pounds of amphetamine would be proved at trial. The court allowed the proof over the objections of defense counsel.

During the course of the trial, the prosecutor introduced two days testimony growing out of the summary revocation of Mr. Howard's passport and his detention in the Philippines.

On February 10, 1995 a jury convicted Mr. Howard of conspiracies to possess with the intent to distribute marijuana and methamphetamine. He was acquitted on the third related charge which involved cocaine.

After an adjournment of the proceedings, the parties returned to court to complete a trial on the criminal forfeiture count which was a part of the indictment the

jury had been sworn to try. Over objection by the defendant, the government dismissed the criminal forfeiture count.

Thereafter, Mr. Howard was sentenced under the 1994-95 edition of the Sentencing Guidelines. At sentencing, expert testimony demonstrated that the bulk of the methamphetamine for which Mr. Howard was held responsible was DL-methamphetamine, "simply a mixture" of D-methamphetamine and L-methamphetamine. The Judge counted the DL-methamphetamine as all D-methamphetamine over the objection of Mr. Howard's counsel and imposed a 30 year sentence on the 64 year old defendant.

During the sentencing hearing the prosecution also requested a fine of 1.2 million dollars in addition to imprisonment. Defense counsel argued that following a sentence of 30 years, the impact of a fine would be negligible. Defense counsel also pointed out that Mr. Howard did not have the resources with which to pay the fine. Despite the prosecution's recommendation and over defense counsel's objection, the trial court imposed a fine of two million dollars, nearly twice the fine sought by the prosecutor. In effect, the punitive nature of the fine served as a substitute for the criminal forfeiture count which had been dismissed after jeopardy had attached.

Mr. Howard received a sentence of 30 years imprisonment and a two million dollar fine. An appeal was filed with the Eleventh Circuit. On March 14, 1996, Mr. Howard's sentence was affirmed by the Eleventh Circuit without an opinion.

REASONS FOR GRANTING THE WRIT

I. THE DEPRIVATION OF ROBERT HOWARD'S PASSPORT WITHOUT PRIOR NOTICE OR A HEARING WAS A VIOLATION OF HIS DUE PROCESS RIGHTS UNDER THE FIFTH AMENDMENT AND ANY EVIDENCE DERIVED FROM ROBERT HOWARD DURING HIS DETENTION AND RETURN TO THE UNITED STATES SHOULD HAVE BEEN SUPPRESSED AT TRIAL AS THE FRUITS OF THE POISONOUS TREE.

The right to travel is a Fifth Amendment liberty and a citizen cannot be deprived of that right without due process of law under the Fifth Amendment. *Kent v. Dulles*, 357 U.S. 116, 125 (1958); *Edwards v. California*, 314 U.S. 160 (1941). The right to travel is susceptible to reasonable regulation. Congress has delegated the authority to regulate travel to the Secretary of State. The regulation of travel by United States citizens is accomplished through the issuance and renewal of passports.

Because it is a personal right, the authority to regulate travel must be narrowly construed. *Kent v. Dulles*, 357 U.S. 116.

Further:

> Neither the Passport Act nor any Executive Order should be interpreted as intended to authorize the Secretary of State to deny a passport arbitrarily *or without a hearing*. (Emphasis added).

Schactman v. Dulles, 225 F.2d 938, 945 (D.C.Cir. 1955).

The issuance, renewal, and revocation of passports must comport with the requirements of due process. A

fair and open hearing "before the reaching of a judgment" is an essential of due process. *Ohio Bell Telephone Company v. Public Utilities Commission of Ohio*, 301 U.S. 292 (1937); *Bauer v. Acheson*, 106 F.Supp. 445 (1952)

The required hearing provides the opportunity for the citizen to know the basis for the charges alleged and an opportunity to challenge that evidence. *Boudin v. Dulles*, 136 F.Supp. 218 (D.C.Cir. 1955).

When the government moves to deny a fundamental right, not only must it provide notice and opportunity for a hearing, that hearing must be held at a meaningful time, that is, a time that permits the possibility of averting the adverse action. Specifically, the hearing should be held *before* the "final administrative order becomes effective." *Ewing v. Mytinger & Castleberry*, 339 U.S. 594 (1950); *Bauer v. Acheson*, 106 F.Supp. 445 (1952); *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972); *Johnson v. U.S. Department of Agriculture*, 734 F.2d 774 (11th Cir. 1984).

> We have repeatedly held that no hearing at the preliminary stage is required by due process *so long as the requisite hearing is held before the final administrative order becomes effective.* (Citations omitted) (Emphasis added).

Ewing v. Mytinger & Castleberry, 339 U.S. 594 (1950).

The plain language of the Fifth Amendment requires that a hearing must be given before the deprivation of liberty or property.

> No person shall be . . . deprived of life, liberty, or property, without due process of law; . . .

United States Constitution, Amendment V.

Regulations enacted by the Secretary in 1966 were amended by Congress in 1982 to ensure that an American passport has the same validity as certificates of nationalization or citizenship. The amended statute provides in pertinent part:

> The following documents shall have the same force and effect as proof of United States citizenship as certificates of naturalization or of citizenship issued by the Attorney General or by a court having naturalization jurisdiction:
>
> > (1) A passport, during its period of validity . . . issued by the Secretary of State to a citizen of the United States.

22 U.S.C. § 2705.

The Attorney General, under 8 U.S.C. § 1453, has the power to revoke a certificate of naturalization only when "it shall appear to the Attorney General's satisfaction that such document of record was illegally or fraudulently obtained from, or was created through illegality or by fraud practiced upon him." 8 U.S.C. § 1453.

Additionally, the Attorney General must grant the holder of the certificate at least 60 days to show cause why the revocation should not occur. 8 U.S.C. § 1453.

In the only reported case to rule upon the point, the 9th Circuit Court of Appeals has held that the Secretary must hold a hearing *prior* to the revocation of a passport and can only revoke a passport when it was *illegally* or *fraudulently* obtained. In *Magnuson v. Baker*, 911 F.2d 330 (9th Cir. 1990) the Court noted:

> As discussed, the 'same force and effect' language of 22 U.S.C. § 2705 requires the Secretary

> of State to treat passports in the same manner as certificates of citizenship or naturalization *in all respects*. Thus, after reviewing Congress' limitations on the Attorney General's powers to revoke certificate, we conclude that 22 U.S.C. § 2705 mandates two limitations upon the Secretary's power to revoke a passport. First the secretary must grant a passport holder an opportunity to be heard *before* he revokes a passport, at least where as here the Secretary has adjudicated the issue of citizenship. Second, Section 2705 necessarily limits the ground for revoking a passport to those expressed in Sections 1451 and 1453. If we were to rule otherwise, we would accord those who use their passport as evidence of their citizenship less protection than those who use other documents as evidence denoting citizenship. Such a difference in treatment would contradict the 'same force and effect' language of Section 2705.

Magnuson at 335. (Emphasis added.)

In the present case, there is no question that the government violated the Due Process clause because it did not provide notice to Mr. Howard nor a pre-revocation hearing. Moreover there was never any evidence that his passport was obtained illegally or by fraud.

In seeking to justify the summary deprivation of Mr. Howard's passport, the prosecution relied upon *Haig v. Agee*, 453 U.S. 280 (1981). The factual situation in *Agee* was very different than that in the present case. Mr. Agee had used his American passport to travel throughout the world and reveal the identity of CIA agents and classified information.

The Secretary of State revoked Agee's passport without notice because Agee had used his passport to cause "serious damage to the national security and foreign policy of the United States." *Id.* at 286. Further, this court found that summary revocation of Agee's passport was the *only* avenue available to the government to limit Mr. Agee's destructive activities.

Agee does not apply in the present case. Mr. Howard's presence in the Philippines was legitimate. By no stretch of the imagination did Mr. Howard pose a threat to the national security of the United States.

Regardless of the fact that he had been indicted after he lawfully left the United States to reside in the Philippines, Mr. Howard was entitled to the protections of the Fifth Amendment due process clause. Those requirements mandate notification of the *pending* revocation, an opportunity to review the evidence to be presented against him, and a hearing before a hearing officer *prior* to the adverse action. Such a hearing could have been conducted in the Philippines at the United States Embassy. At the hearing Mr. Howard would have had a chance to refute directly the evidence against him and challenge the pending adverse action, i.e., the contemplated revocation of his passport. He would further have had the opportunity to challenge the constitutionality of the regulation which purportedly allows the State Department to revoke a passport solely because of the return of an indictment.[1]

---

[1] 22 C.F.R. § 51.70(a)(1); 22 C.F.R. § 51.72. The regulation purports to mandate revocation merely upon proof that criminal process has issued for the passport holder prior to conviction. No other right of citizenship, including the right to vote, is subject to administrative revocation upon such grounds.

The United States government did not have to resort to a violation of Mr. Howard's constitutional right to due process to return Mr. Howard to the United States. At the time of Mr. Howard's passport revocation, the United States did not have an extradition treaty with the Philippines. However, considering the United States' considerable historic influence in the Philippines, it could have asked for Mr. Howard's return by comity. "International Proceedings for the Apprehension and Rendition of Fugitive Offenders." Vol. 74, *Proceedings of the Annual Meeting-American Society of International Law Ann.* (1980), pp. 274-289.

Alternatively, the United States would have been in no way harmed by any delay while giving Mr. Howard his opportunity to refute the allegations against him and retain his passport. Had Mr. Howard ultimately had his passport revoked after a fair hearing, Mr. Howard would have been deported by the Filipino government. Had Mr. Howard retained his passport, the United States could have requested his return as a matter of comity.

Historically the Department of State has maintained that the issuance, or revocation, of a passport is a prerogative of the Department, not a right of the individual citizen. In the Passport Act of August 18, 1856 (11 Stat. 60: Rev. Stat. 4075), the Secretary of State was first authorized to issue passports under rules designated by the President. In the Passport Act of July 3, 1926 (44 Stat. 887), the Secretary of State was again authorized to issue passports. Until 1958 the State Department maintained the view that the Secretary of State had absolute discretion over the issuance of passports and therefore could refuse a passport to a United States citizen.

In June, 1958 this Court rejected the Secretary of State's position regarding the issuance of passports. This Court said:

> Since we start with an exercise by an American citizen of an activity included in constitutional protection [the right to travel], we will not readily infer that Congress gave the Secretary of State unbridled discretion to grant or withhold it.

Kent v. Dulles, 357 U.S. 116 (1958).

The Department of State has now promulgated regulations at 22 C.F.R §§ 51.80-89 which describe the hearing procedure which Mr. Howard was effectively denied.

> Any person whose application for issuance of a passport has been denied, or who has otherwise been the subject of an adverse action taken on an individual basis with respect to his or her right to receive or use a passport shall be entitled to notification in writing of the adverse action. The notification shall set forth the specific reasons for the adverse action and the procedures for review available under §§ 51.81 through 51.105.

22 C.F.R. § 51.75.

> A person who has been the subject of an adverse action with respect to his or her right to receive or use a passport shall be entitled, upon request made within 60 days after receipt of notice of such adverse action, to require the Department or the *appropriate Foreign Service post*, as the case may be, to establish the basis for its action in a proceeding before a hearing officer. . . .

22 C.F.R. § 51.81. (Emphasis added).

Mr. Howard's passport was revoked without a hearing and a meaningful opportunity to refute the allegations made against him or challenge the constitutionality of the regulation that purportedly authorized revocation of his passport. He was deported by the Filipino government in what was in actuality a subterfuge for extradition from a country with which we had no extradition treaty. As a result of this violation of due process, the prosecution obtained and introduced into its case in chief evidence from the Philippines which constituted the fruit of the poisonous tree under *Wong Sun v. United States*, 371 U.S. 471 (1963). This evidence should have been suppressed. The Petitioner respectfully asks this court to hold that revocation of a United States passport without notice or a pre-revocation hearing is unconstitutional absent the unique factors set forth in *Agee*.

II. THE COURT'S FAILURE TO GRANT MR. HOWARD'S MOTION TO STRIKE THE GOVERNMENT'S THIRD BILL OF PARTICULARS, WHICH ADDED A DRUG NOT ALLEGED IN THE GRAND JURY'S INDICTMENT, CONSTRUCTIVELY AMENDED THE INDICTMENT THEREBY REQUIRING THAT MR. HOWARD'S CONVICTION BE REVERSED.

The Fifth Amendment provides that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . . " U. S. Constitution Amendment V. "The purpose of this clause is to limit the jeopardy of an accused 'to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or

judge.'" *United States v. Bissell*, 866 F.2d 1343, 1356 (11th Cir. 1989) (*quoting Stirone v. United States*, 361 U.S. 212, 218 (1960)).

When the offense charged by the grand jury is altered, an amendment to the indictment occurs. *United States v. Alvarez-Moreno*, 874 F.2d 1402, 1410 (11th Cir. 1989). "If proven, such an amendment violates a defendant's right to be tried solely on the allegations returned by the grand jury and requires reversal." *United States v. Cruz-Valdez*, 743 F.2d 1547, 1553 (11th Cir. 1984) (*citing Stirone v. United States*, 361 U.S. 212, 218 (1960)).

The Government's Third Bill of Particulars constructively amended the indictment, in violation of Mr. Howard's rights under the Fifth Amendment to the United States Constitution, by the last minute addition of proof on the drug amphetamine. This charge had not been presented by the grand jury. The Government's Third Bill of Particulars also denied Mr. Howard his due process right to be informed in a timely manner of the nature and cause of the accusation against him and denied him his Sixth Amendment right to effective assistance of counsel, coming as it did the weekend before trial.

By adding 125 pounds of amphetamine to the three drugs originally charged, over defendant's objection, the Third Bill of Particulars changed the essential elements of the offenses alleged in the indictment, broadened the possible bases of conviction, and constructively amended the indictment. This alteration of the indictment alone required reversal. *See United States v. Flynt*, 15 F.3d 1002, 1005 (11th Cir. 1994) ("Constructive amendment of the indictment is *per se* reversible error."); *Stirone v. United*

States, 361 U.S. 212, 218 (1960) (Broadening the possible bases of conviction is reversible error.) Because this constitutes plain error *per se*, it must be presumed that the defendant has been prejudiced by the constructive amendment of the indictment. *U.S. v. Floresca*, 38 F.3d 706 (4th Cir. 1994). *See also Stirone, supra* at 273.

The presentation of evidence regarding amphetamine created a risk of conviction for an uncharged offense. The district court allowed evidence to be presented regarding a substantial quantity of amphetamine. Subsequently, the court included that quantity of amphetamine in the calculation of Mr. Howard's base offense level. Not only did the introduction of this evidence put Mr. Howard at additional risk before the jury, the exposure to that risk was realized. Had it not been included, Mr. Howard's base offense level would have been lowered significantly.

The trial proof was allowed to go beyond the parameters of the indictment and establish an additional offense. The indictment was specific as to which drugs were involved in the conspiracy and amphetamine was not one of them.

> The Supreme Court has made it clear, however, that an indictment drawn in more general terms may support a conviction on alternative bases, even though an indictment with specific charging terms will not:. . . . (Citations omitted).

U.S. v. Zingaro, 858 F.2d 94, 99 (2nd Cir. 1988).

The evidence of the amphetamine was before the jury for consideration and the jury may have convicted Mr. Howard on a ground not alleged in the indictment. The

Seventh Circuit has labeled such an occurrence a constructive amendment and held it violative of the Fifth Amendment.

> A resulting conviction cannot stand because there is no assurance that it matches the offense charged. It is, in other words reversible *per se*.

U.S. v. Willoughby, 27 F.3d 263, 266 (7th Cir. 1994).

The Eleventh Circuit, by affirming Mr. Howard's sentence and thus the constructive amendment of the indictment, has strayed from the generally accepted precept that a defendant cannot be tried on charges not set out in the indictment. The war on drugs has tested the underpinnings of our judicial system in historic ways. While no doubt the struggle is important, so too are the values that the Bill of Rights was meant to incorporate. Notice of the charges in a criminal case and the opportunity to effectively meet them are so fundamental to our criminal process that this court would be right to resolve the issue raised on the facts of this case.

III. THE DISTRICT COURT'S IMPOSITION OF A TWO MILLION DOLLAR FINE CONSTITUTED AN EXCESSIVE FINE AND AN ABUSE OF POWER IN VIOLATION OF THE EIGHTH AMENDMENT.

The imposition of a two million dollar ($2,000,000) fine upon the petitioner constituted an excessive fine and an abuse of governmental power in violation of the Eighth Amendment because petitioner does not have the ability to pay the fine, because the fine will serve to punish his innocent wife and because in the end the fine

is a subterfuge for the criminal forfeiture count which the prosecution chose to dismiss after jeopardy attached.

"[T]he Excessive Fines Clause limits the Government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'" *Austin v. United States*, ___ U.S. ___, 113 S.Ct. 2801, 2805 (1993) (*quoting Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 266 (1989)). "The primary focus of the Eighth Amendment [is] the potential for governmental abuse of its prosecutorial power." *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257. 266 (1989).

Although this Court has declined to establish a multifactor test for determining whether a fine is "constitutionally excessive" under the Excessive Fines Clause,[2] Congress and the United States Sentencing Commission have established factors to be considered in determining the amount of the fine to be imposed. Both 18 U.S.C. § 3572 and U.S.S.G. 5E1.2(d) state that the District Court "*shall consider*":

(1) a defendant's ability to pay the fine,

(2) the burden the fine will place on the defendant's dependents, and

(3) the need to provide just punishment, afford adequate deterrence, and deprive the defendant of illegally obtained gains.

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[2] *See Austin v. United States*, 113 S.Ct. 2801, 2812 (1993) (Declining to establish a multifactor test for determining excessiveness of criminal forfeiture); and *Alexander v. United States*, 113 S.Ct. 2766, 2775-76 (1993) (Holding criminal forfeiture to be "no different, for Eighth Amendment purposes, from a traditional fine.")

See 18 U.S.C. §§ 3572(1)-(2), (5), and U.S.S.G. 5E1.2(d)(1)-(3).

The only factor the District Court considered was the need to deprive petitioner of illegally obtained gains. The transcript of the sentencing hearing reveals that the District Court was particularly concerned with stripping petitioner of his possessions:

> Congress has taken an approach in recent years that demonstrates and shows its disdain for certain criminal offenses and it's completely revised the sentencing process in recent years, as he alluded to earlier, part of which is for the purpose of punishing a defendant, some of which is to deactivate a defendant, remove him from society and violating the law, and part of which is to try to return parties to their previous state; that is, by restitution, which there's no restitution being made in this case; or by otherwise not allowing a criminal defendant to retain their ill-gotten gains, and in my judgment that's part of what large fines are aimed at. When Congress puts four million dollars as the maximum fine range, it couldn't be for any other purpose, in my judgment, but to allow the public to put the parties back where they were.

R25 – 94-95.

But, a court's desire to put parties "back where they were," to the exclusion of all other relevant considerations, cannot support such a large fine, as the Eighth Circuit Court of Appeals said in *United States v. Walker*, 900 F.2d 1201 (8th Cir. 1990) in which it reversed a two million dollar fine:

> We recognize the district court also is controlled by the guidelines directing that the sentence imposed should punish and deter. *See* § 5E1.2(d)(1), (e). The district court apparently relied on these factors since it referred to Walker's 'open and defiant' manner of violating the law, and the need for a substantial penalty to address his 'reprehensible conduct.' We agree that the defendant's conduct was serious, and at times, a flagrant abuse of the law. This conduct does not, however, allow the district court to assess a fine based on that conduct to the exclusion of other relevant considerations. When imposing any fine, the district court must consider the defendant's ability to pay, in light of his earning capacity, and the burden the fine places on the defendant.

Id. at 1206.

The transcript of the sentencing hearing reveals that the District Court failed to consider petitioner's ability to pay a two million dollar fine.[3] At the hearing, the District

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[3] The defendant's ability to pay the fine has historically proven to be the primary consideration in determining if a fine should be imposed. *See United States v. Vargas*, 16 F.3d 155 (7th Cir. 1994) (Fine vacated where Court failed to consider defendant's financial resources); *United States v. Bauer*, 19 F.3d 409 (8th Cir. 1994) (Fine vacated where "district court did not expressly find that he [defendant] had the ability to pay a $2,500,000 fine"); *United States v. Stevens*, 985 F.2d 1175 (2nd Cir. 1993) ($2,000,000 fine remanded where "court gave no indication that it considered . . . ability to pay."); *United States v. Shulman*, 940 F.2d 91 (4th Cir. 1991); *United States v. Washington-Williams*, 945 F.2d 325 (10th Cir. 1991); *United States v. Walker*, 900 F.2d 1201 (8th Cir. 1990).

Court noted without explanation that it was of the "opinion" that Petitioner had accumulated a substantial estate:

> *I'm of the* ***opinion*** *that this is a case in which one has accumulated and accrued a substantial estate because of their activity, his activity,* in criminal conduct, and I think that the policy-making body of this country – that is, the Congress – enacted laws that set forth its desire and wish that not only prison but financial sanctions be imposed. I don't always assess them in every case because there's not necessarily the assets from which to acquire, but *the evidence is pretty clear in this case that there are substantial assets,* and in my judgment those assets were substantially accrued and accumulated from ill-gotten and illegal gains.

(R25-97-98).

Petitioner's "estate" and "substantial assets" to which the District Court referred were not and are not worth two million dollars. Petitioner's assets included the farm on which the petitioner and his wife lived and two other nearby tracts of land that were owned jointly with others. These three tracts of property (about which testimony was elicited in the government's case in chief) were the subject of a criminal forfeiture count that was dismissed after unusual circumstances.[4]

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[4] After the jury's guilty verdict but prior to the beginning of the trial on the criminal forfeiture count, a juror tried to contact the District Court to determine what a juror could do if the jury had reached the wrong result. Unable to reach the court, the juror called defense counsel to express the same fears. Counsel declined to take the call and reported the attempted contact to the District Court. Ultimately the court conducted a hearing on

Petitioner's assets also include bank accounts which were the subject of testimony in the government's case in chief. If the proof in the case demonstrated anything, it was that the accounts did not contain any sum of money which could begin to pay a two million dollar fine. And if the government had any question about these or any other assets, both the petitioner and his wife testified during trial and were available for any questioning the prosecution or the court might have chosen to pursue.

The petitioner's ability to pay the two million dollar fine should not have been based upon any estimate of the amount of money petitioner profited from the offense. The government recommended that petitioner be fined 1.2 million dollars, the difference between the amount of money petitioner's car dealership received ($600,000) and the amount of money that went through petitioner's bank account (1.8 million). Profit, however, does not dictate the amount of the fine. What is important is the defendant's "present and future" ability to pay. *See United States v. Lombardo*, 35 F.3d 526, 527 (11th Cir. 1994). *See also United States v. Remillong*, 55 F.3d 572, 575 (11th Cir. 1995) ("'[R]estitution is only appropriate in an amount that the defendant can realistically be expected to pay,'" not the amount taken in the bank robbery.) (*quoting United States v. Logar*, 975 F.2d 958, 964 (3rd Cir. 1992)); and *United*

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the matter and after hearing from the juror herself, the court held that the juror should *not* be disqualified from continuing as a juror in the remaining criminal forfeiture phase of the case. The court, however, then granted the government's motion for mistrial on the criminal forfeiture count over an objection by the defense. Clearly at this point jeopardy had attached to the forfeiture count.

States v. Rowland, 906 F.2d 621 (11th Cir. 1990) (District Court's fine reversed where determination of fine was based on amount of money stolen, not defendant's ability to pay the fine).

The District Court also failed to consider that a $2,000,000 fine punished the petitioner's wife. Mrs. Howard was sixty (60) years old, in ill health, received only $506.00 per month in disability income, and resided on the family farm, which the United States said it would seek to liquidate to satisfy the fine. Mrs. Howard's name does not appear on any of the marital property, and absent certain inchoate rights she may possess under state property law, she may have difficulty contesting the Government's execution on the property to satisfy the fine. And since her husband was sentenced to serve thirty years in prison, a life sentence for a 64 year old man, Mrs. Howard will have no other means of future support.

Petitioner could not "realistically be expected to pay" a two million dollar fine. Furthermore, if the fine is not reduced, an innocent third party will suffer. Moreover the fine is a transparent subterfuge, an alternative means of pauperizing the petitioner after the government had elected to dismiss the criminal forfeiture count halfway through trial. Because the District Court failed to consider the proper factors, and indeed seemed to substitute a harsh fine in lieu of the dismissed criminal forfeiture count, this Court should reverse imposition of the two million dollar fine and remand for consideration of the petitioner's ability to pay, the burden the fine will place on his wife, and whether any fine can be imposed at all when the prosecution dismissed the criminal forfeiture count after jeopardy attached.

IV. THE AMBIGUITIES IN THE SENTENCING GUIDELINES REGARDING THE TREATMENT OF THE VARIOUS FORMS OF METHAMPHETAMINE ARE SO COMPLEX THAT THEY DO NOT PROVIDE THE DEFENDANT WITH APPROPRIATE DUE PROCESS NOTICE AS TO WHICH LEVEL OF PUNISHMENT ATTACHES TO WHICH CONDUCT.

One function of the Supreme Court of the United States is to reconcile conflicting views from the various Circuit Courts of Appeal to ensure that all citizens are treated consistently and fairly. The present case raises just such a conflict between the Eleventh and Third Circuits under the Federal Sentencing Guidelines.

Federal Circuit Courts have come to different conclusions as to the treatment of Dextro-methamphetamine (D-methamphetamine), Levo-methamphetamine (L-Methamphetamine), DL-methamphetamine, methamphetamine, and methamphetamine (actual) with regard to base offense levels assigned to each form of methamphetamine mentioned in the Guidelines.

The Eleventh Circuit in *U.S. v. Carroll*, 6 F.3d 735 (1993) has ruled that there are three "molecular" forms of methamphetamine, 1) D-methamphetamine, 2) L-methamphetamine, and 3) DL-methamphetamine. The *Carroll* court also held that DL-methamphetamine is not simply a mixture of D-methamphetamine and L-methamphetamine; that methamphetamine (actual) refers to the drug quality and not type, that is the relative purity of the compound in whatever form; that "methamphetamine" does not equate with D-methamphetamine; and that "methamphetamine" encompasses all forms of methamphetamine except "to the

extent a particular molecular form of methamphetamine is treated separately by the Guidelines, . . . " *Carroll* at 745.

The Third Circuit in *U.S. v. Bogusz*, 43 F.3d 82 (3rd Cir. 1994) has rejected the reasoning in *Carroll*. The court held that methamphetamine refers solely to pure quantities of D-methamphetamine. That court also found that chemistry texts recognize only D- and L- forms of methamphetamine and concluded that DL-methamphetamine is a mixture of the two forms.

The Tenth Circuit in *U.S. v. Cook*, 49 F.3d 663 (10th Cir. 1995) could not determine from the Guidelines themselves whether DL-methamphetamine is "pure methamphetamine" as:

> . . . the Guidelines themselves do not specify what "pure methamphetamine" means.

Cook at 665.

The case was therefore remanded for expert testimony on the chemical nature of DL-methamphetamine.

On remand, after expert testimony, the District Court concluded that DL-methamphetamine is not a third form of methamphetamine as the Eleventh Circuit held, "but is a racemic [i.e., having equal amounts of dextro- and levorotary forms of the same compound] mixture of the d and l isomers of methamphetamine." *U.S. v. Cook*, 891 F.Supp. 572, 573 (D.Kan. 1995). *Cook* also held on remand that DL-methamphetamine was not a simple mixture of D and L, but that it was a product of a chemical process and was not easily separated. Therefore, it could be scored as methamphetamine (actual).

The importance of how "methamphetamine" is treated is underscored under Federal Sentencing Guidelines for marijuana equivalents for various forms of methamphetamine in the Drug Equivalency Table. The marijuana equivalent for methamphetamine (actual) is ten times that of methamphetamine and 250 times that of L-methamphetamine. The effect on sentencing using the various forms of methamphetamine is enormous and can result in varying sentences depending on how the methamphetamine is scored.

The Circuit Courts have expressed frustration over the confusing nature of the Guidelines. In footnote 3 in *U.S. v. Cook*, 49 F.3d 663 (10th Cir. 1995) the Tenth Circuit commented:

> Indeed, the guidelines' entire approach to methamphetamine sentencing is confusing and difficult to apply.

The Tenth Circuit also noted that:

> . . . the Sentencing Commission appears to be uncertain as to whether DL-methamphetamine is a third form of methamphetamine or is simply a mixture of D-methamphetamine and L-methamphetamine. *See* 60 Fed. Reg. 2430, 2456 (1995) . . .

U.S. v. Cook, 49 F.3d 663, 666 (10th Cir. 1995).

In Judge Bright's partial dissent in *Carroll, supra* he referred to the "confusing material" in the sentencing guidelines. In a concurring opinion in *U.S. v. Smith*, 997 F.2d 396, 399 (8th Cir. 1993), Judge John R. Gibson alluded to the "complex hypertechnical system consuming great amounts of judicial time for both trial and appellate

judges" created by the sentencing guidelines and Judge Bright in his dissenting opinion in the same case termed the guidelines "bulky, almost incomprehensible."

In a Fifth Circuit case, *U.S. v. Seyfert*, 67 F.3d 544 (5th Cir. 1995), the court did not reach the issue of how DL-methamphetamine should be treated for purposes of calculating a defendant's base offense level. However, the court did note that the Sentencing Guidelines do not explicitly address the issue. The court went on to comment that, with the lack of case law on the subject and the lack of reference to DL-methamphetamine in the Sentencing Guidelines, a case could be made for treating the Levo component of DL-methamphetamine separately from the Dextro component.

In the instant case Mr. Charles Clark, the Drug Enforcement Administration expert and a forensic chemist, testified at the sentencing hearing that DL-methamphetamine is "simply a 50-50 mixture of those two compounds," D-methamphetamine and L-methamphetamine. The District Court scored the mixture as wholly D-methamphetamine over the objections of counsel. This resulted in a base offense level that was two levels higher than it would have been had the court counted the DL-methamphetamine as a simple mixture and scored it as one-half D-methamphetamine and one-half L-methamphetamine.

The Sentencing Guidelines have clouded rather than clarified the sentencing process where crimes involving methamphetamine are concerned. The Circuit Courts are at a loss as to the meaning of Guidelines which use terms without adequately defining them and need the guidance

of this court to cut the Gordian knot. A defendant is surely as puzzled as the Courts by the Guidelines, not knowing how the court will interpret the Guidelines in any particular case. Defendants in cases involving methamphetamine have a serious liberty interest at stake during the sentencing phase of their trials. There is no due process when the accused has little idea as to what punishment he or she might be exposed. The issue presented by the conflicting interpretations of the Guidelines presents this Court with an opportunity to exercise its power to guarantee the fair application of the Fifth Amendment due process clause.

V. CONCLUSION

By the unilateral revocation of the right to travel, a last minute amendment to the charges, the imposition of an excessive fine after the dismissal of the criminal forfeiture count and the imposition of a punitive sentence under Federal Sentencing Guidelines which are in conflict among the various Circuits which have considered them, the Fifth and Eighth Amendments to the United States Constitution have been abridged in ways that should be addressed by the highest court in the land.

Mr. Howard respectfully requests this Court to grant the petition for certiorari.

Respectfully submitted,

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Attorney for Petitioner

No. _____

In The

Supreme Court of the United States

October Term, 1995

ROBERT W. HOWARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-8470

D. C. Docket No. 2:93-cr-014-WCO

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERT WINFORD HOWARD,
aka Bob Howard,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Georgia

(March 14, 1996)

Before COX and BARKETT, Circuit Judges, and PROPST*, District Judge.

PER CURIAM: AFFIRMED. *See* 11th Cir. Rule 36-1.

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*Honorable Robert B. Propst, U.S. District Judge for the Northern District of Alabama, sitting by designation.

AMENDMENT 5

Criminal actions – Provisions concerning – Due process of law and just compensation clauses. – No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * *

AMENDMENT 8

Bail – Punishment. – Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

22 C.F.R. § 51.70

§ 51.70 Denial of passports.

(a) A passport, except for direct return to the United States, shall not be issued in any case in which the Secretary of State determines or is informed by competent authority that:

(1) The applicant is the subject of an outstanding Federal warrant of arrest for a felony, including a warrant issued under the Federal Fugitive Felon Act (18 U.S.C. 1073); or

* * *

§ 51.72 Revocation or restriction of passports.

A passport may be revoked or restricted or limited where:

(a) The national would not be entitled to issuance of a new passport under § 51.70 or § 51.71; or

(b) The passport has been obtained by fraud, or has been fraudulently altered, or has been fraudulently misused.

* * *

§ 51.75 Notification of denial or withdrawal of passport.

Any person whose application for issuance of a passport has been denied, or who has otherwise been the subject of an adverse action taken on an individual basis

with respect to his or her right to receive or use a passport shall be entitled to notification in writing of the adverse action. The notification shall set forth the specific reasons for the adverse action and the procedures for review available under §§ 51.81 through 51.105.

* * *

§ 51.81 Time limits on hearing to review adverse action.

A person who has been the subject of an adverse action with respect to his or her right to receive or use a passport, shall be entitled, upon request made within 60 days after receipt of notice of such adverse action, to require the Department or the appropriate Foreign Service post, as the case may be, to establish the basis for its action in a proceeding before a hearing officer.

* * *

18 U.S.C. § 3572. Imposition of a sentence of fine and related matters

(a) Factors to be considered. – In determining whether to impose a fine, and the amount, time for payment, and method of payment of a fine, the court shall consider, in addition to the factors set forth in section 3553(a) –

(1) the defendant's income, earning capacity, and financial resources;

(2) the burden that the fine will impose upon the defendant, any person who is financially dependent on the defendant, or any other person (including a government) that would be responsible for the welfare of any person financially dependent on the defendant, relative to the burden that alternative punishments would impose;

* * *

(5) the need to deprive the defendant of illegally obtained gains from the offense;

* * *

USSG § 5E1.2

* * *

(d) In determining the amount of the fine, the court shall consider:

(1) the need for the combined sentence to reflect the seriousness of the offense (including the harm or loss to the victim and the gain to the defendant), to promote respect for the law, to provide just punishment and to afford adequate deterrence;

(2) any evidence presented as to the defendant's ability to pay the fine (including the ability to pay over a period of time) in light of his earning capacity and financial resources;

(3) the burden that the fine places on the defendant and his dependents relative to alternative punishments;

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

UNITED STATES OF AMERICA	:	CRIMINAL NO. 2:93-CR-14(S)-WCO
VERSUS	:	
ROBERT WINFORD HOWARD, a/k/a Bob Howard	:	(Filed Jan. 24, 1995)

ORDER

The captioned case is before the court for consideration of the magistrate judge's report and recommendation [117-1] and certain outstanding motions requiring resolution prior to trial. Addressed in the report and recommendation are numerous motions, each of which will be individually considered below.

Motions to Strike Surplusage From the Superseding Indictment

Defendant has filed two separate motions to strike surplusage from the superseding indictment [70-1; 78-1]. The former asks the court to strike numerous references to concealment of the conspiracy as an object of the conspiracy. The latter asks the court to strike overt acts 2 and 10 under Count I, on the basis that these acts are not "acts in furtherance of the conspiracy." In both instances, the magistrate judge deferred consideration to this court.

"A motion to strike surplusage from an indictment should not be granted 'unless it is clear that the allegations are not relevant to the charge and are inflammatory and prejudicial. . . . [T]his is a most exacting standard.' " *United States v. Awan*, 966 F.2d 1415, 1426 (11th Cir. 1992) (*quoting United States v. Huppert*, 917 F.2d 507, 511 (11th Cir. 1990) (citations omitted)). The *Awan* court further suggested that it is proper for the trial court to defer ruling on the motion until evidence is heard which will establish the relevancy, or lack thereof, of the allegations at issue. *Id.* at 1426.[1] The deferral of a ruling is, however, an option and not a mandate. Consistent with this court's practice of reading the indictment in its entirety to the jury prior to the commencement of the presentation of evidence, the court will rule upon each of these motions in this order.

As noted, the first motion [70-1] seeks to strike references to concealment of the conspiracy as an object thereof. It is clear that, as a matter of theory, an act of concealment can play a significant role in furthering a criminal conspiracy. *See Grunewald v. United States*, 353 U.S. 391, 405 (1957). "[A] vital distinction must be made between acts of concealment done in furtherance of the *main* criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime." *Id.* Thus, any after-the-fact coverup is not a per se indication of a conspiracy to conceal. Rather, the evidence

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[1] If the option of reserving ruling is utilized, the court can prevent the jury from being prejudiced by providing only a summary of the indictment prior to trial. *Awan*, 966 F.2d at 1426.

must suggest that the very concealment itself was an integral step toward the ultimate objective of the conspiracy. A review of the specific sections challenged by defendant (itemized in defendant's motion [70-1]) indicates overwhelmingly that these references, if proven, could show acts in furtherance of the conspiracy charged in the superseding indictment. The one possible exception to this is the allegation that a visit to an attorney in the Spring of 1991 was an act in furtherance of the conspiracy. Because the visit with the attorney is too peripheral to the alleged conspiracy to distribute and conceal the distribution of illegal drugs, it is appropriately struck from the superseding indictment. The other challenged provisions, though, can all be considered to further the conspiracy in at least some way. Therefore, defendant's motion is hereby GRANTED in part and DENIED in part [70-1].

The second motion to strike seeks to have overt acts 2 and 10 removed from Count I of the superseding indictment [78-1]. Simply stated, the defendant contends that the acts itemized above were not in furtherance of the conspiracy. The government takes issue with this assertion in their response [83-1].[2] It is precisely this sort of factual dispute which renders the question most appropriate for determination by the jury. Therefore, defendant's motion is hereby DENIED [78-1]. However, in an effort to avoid any confusion or inappropriate insinuations to the jury, overt act 10 of Count I shall be omitted

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[2] The government's response [83-1] also addressed the first motion to strike surplusage, discussed above, concerning allegations of concealment.

from the reading of the superseding indictment to the jury.

Motion to Disclose the Identity of Confidential Informants

Defendant has moved the court to order the government to disclose the identity of any confidential informants [77-1]. This motion was properly before the magistrate judge for a final determination, and this court accordingly will review that decision only for clear and convincing error.[3]

The magistrate judge denied the motion to the extent it concerned any individuals who did not actively participate in the crimes charged. The magistrate judge further denied the motion to the extent it concerned unindicted co-conspirators previously itemized in a bill of particulars.

The magistrate judge did, however, order that the government disclose the identity of any previously unidentified potential witnesses or individuals who constitute more than "mere tipsters." The government objected to this order.

At the outset, the government notes that they have already provided a list of unindicted co-conspirators in a bill of particulars. Insofar as the disclosure of informants

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[3] *See* 28 U.S.C. § 636(b)(1)(A) and Local Rules of the United States District Court for the Northern District of Georgia, R. 500-1(c)(2).

is concerned, the general standard has been set forth by the United States Supreme Court:

> What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. . . . The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. . . .
>
> The scope of the privilege is limited by its underlying purpose. Thus, where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged . . .
>
> A further limitation on the applicability of the privilege arises from fundamental requirements of fairness. Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.

Rovario v. United States, 353 U.S. 53, 60-61 (1957). The *Rovario* court further held that "no fixed rule with respect to disclosure is justifiable." *Id.* at 62. Thus, the court is required to balance the competing interests of preserving the willingness of informants to cooperate and of allowing a defendant to exercise his right to prepare a defense.

The magistrate judge relied upon the *Rovario* standard in formulating the order. The government's objection, while conceding the vitality of the *Rovario* balancing test, argues that the test is inapplicable to witnesses.

Citing a First Circuit decision, the government contends that the *Rovario* test applies only to an informant who will not be called as a witness. *See United States v. Tejeda*, 974 F.2d 210, 217 (1st Cir. 1992) ("The disclosure requirement in *Rovario* was predicated on the failure of the prosecution to make *either* the informant *or* the informant's identity available to the defense in a case where the informant was *never called as a witness*.") (emphasis in original). The government's argument, albeit not explicitly set forth, is that to hold *Rovario* applicable to witnesses would flout the purposes of the Jencks Act, 18 U.S.C. § 3500(a), which permits the government to withhold the statements of witnesses or potential witnesses, excluding the defendant, until that individual has completed their testimony. The court finds that this argument is persuasive. It would make little sense for the court to compel the government to disclose the identity of potential witnesses pursuant to *Rovario*, only to reverse that decision in accordance with the Jencks Act. Therefore, the government need not disclose the identity of potential witnesses. The magistrate judge's order is hereby AFFIRMED in part and REVERSED in part [77-1].

The Second Specific *Brady* Motion

The magistrate judge denied defendant's second specific motion filed pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) [101-1]. This order, objected to by defendant, is also subject to the clearly erroneous standard of review. The magistrate's order was premised on the untimely nature of the motion and the conclusion that it

exceeded the scope of a *Brady* request. The court will focus only on the latter basis.[4]

The material at issue in the case at bar is allegedly impeaching evidence in the possession of the prosecution. The United States Supreme Court has held that evidence which may be used for impeachment purposes is within the scope of *Brady*. *United States v. Bagley*, 473 U.S. 667 (1985). That notwithstanding, the court believes that the magistrate judge is in the best position to determine whether a given request is within the standard set forth by *Brady* and *Bagley*, namely whether the material requested is favorable to the accused's case. The court is satisfied that the magistrate judge has faithfully applied the law to the facts, and there is nothing in the defendant's objections which suggest that the magistrate judge's finding should be disturbed. Therefore, the order is hereby AFFIRMED [101-1].

The Motion to Suppress Evidence and Statements

The magistrate judge recommended that defendant's motion to suppress evidence and statements relating to the circumstances surrounding the revocation of his passport be denied [71-1]. In the interest of avoiding repetition, the court will not set forth the facts surrounding this

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[4] As noted in defendant's objections, it may not be possible to have an "untimely" *Brady* request, to the extent that *Brady* imposes on the prosecution a continuing duty to disclose exculpatory information to the defendant.

event, as they are well detailed in the report and recommendation. Report & Recommendation at 7-10. The gravamen of defendant's motion is that the Secretary of State's failure to afford defendant a pre-revocation hearing prior to revoking his passport violated the due process clause of the Fifth Amendment, and that his subsequent arrest was tainted by the prior constitutional violation.

The court finds that the magistrate judge's report and recommendation is correct. If the manner in which defendant's presence was secured did not violate due process, then there is no "poisonous tree" capable of bearing "tainted fruit." Defendant's motion to suppress is hereby DENIED [71-1].

Motion Relating to Federal Rules of Evidence 403 & 404

Although not incorporated in the magistrate judge's report and recommendation, there remains two outstanding motions. First, defendant has moved the court to exclude any FED. R. EVID. 404(b) evidence until the court makes a determination as to the admissibility of such evidence pursuant to FED. R. EVID. 403 [76-1]. This is, in essence, an anticipatory motion in the event that the government changes its previously stated position and seeks to introduce evidence pursuant to FED. R. EVID. 404(b). If the government does in fact seek to introduce such evidence, the court will deal with it at that time and make any necessary findings. Accordingly, defendant's motion is hereby DENIED [76-1].

Motion to Strike Third Bill of Particulars or, In the Alternative, Continue the Trial of the Cause

Defendant's final motion, also not referenced in the magistrate judge's report and recommendation, asks the court either to strike the government's Third Bill of Particulars or, in the alternative, continue the cause [129-1]. For reasons articulated at a teleconference on January 20, 1995, and reiterated at a pretrial conference at which counsel for both parties were in attendance, the motion is hereby DENIED [129-1]. It should be noted, though, that because a bill of particulars is not part of the charging document, it shall not be read to the jury prior to the commencement of the presentation of evidence.

IT IS SO ORDERED this 23rd day of January, 1995.

/s/ William C. O'Kelley
WILLIAM C. O'KELLEY
United States
District Judge

* * *

[p. 81] DEFENDANT THE BENEFIT OF THE DOUBT ON THE 3,000 POUNDS ON THAT TEXAS REVERSE AND ADOPT THE 4,499 KILOGRAMS AS RELATES TO MARIJUANA.

AS TO THE COCAINE, I SAID EARLIER I WOULD NOT CONSIDER THAT. I THINK THAT I COULD JUSTIFY CONSIDERING THAT. I DON'T THINK IT REALLY MAKES ANY DIFFERENCE ONE WAY OR THE OTHER. I THINK THE GOVERNMENT'S ARGUMENT THAT IT COULD BE CONSIDERED AS PART OF THE CONSIDERATION OF THE METHAMPHETAMINE CONSPIRACY MAKES SENSE, BUT I DON'T THINK IT MAKES ANY DIFFERENCE AND I'M NOT GOING TO CONSIDER IT. I'M GOING TO ADOPT THE FINDINGS OF THE PROBATION OFFICER AS TO THE AMPHETAMINE AND METHAMPHETAMINE BECAUSE I THINK THAT THERE IS, AND THE EVIDENCE IS VERY CLEAR THAT IT'S LD AND THAT THERE'S THE D IN IT, AND I THINK THE GUIDELINES STATE THAT IF IT'S ANY PART OF IT, YOU CONSIDER THAT.

MR. MOYE: YOUR HONOR, AND I DON'T WANT TO INTERRUPT THE COURT, BUT WE DO HAVE A DIFFERENCE IN I THINK THE EVIDENCE IN TERMS OF THE POUND AND A HALF.

THE COURT: WELL, WE DO AND I DID NOT DELETE THAT, BUT IN MY CALCULATION THAT WON'T MAKE ANY DIFFERENCE. I CAME UP WITH MY CALCULATIONS OF 39,879, BUT IF YOU TAKE THE POUND AND A HALF OUT, IT'S STILL GOING TO BE

IN THE 38, 39 THOUSAND RANGE, WELL ABOVE 30,000, THE THRESHOLD.

CAN YOU CALCULATE THAT RIGHT QUICKLY FOR ME, MR. PERKINS? AND I'LL GET IT EXACTLY RIGHT. TAKE THAT POUND

* * *

* * *

[p. 94] ILL-GOTTEN GAIN WAS USED TO PURCHASE PROPERTY, THEY HAVE FILED ALREADY IN THIS COURT A PROCEEDING AS TO WHICH THE COURT HAS RECENTLY LIFTED A STAY, TO ATTEMPT TO TAKE THOSE PIECES OF PROPERTY. IF IN FACT THOSE PIECES OF PROPERTY WERE USED IN A FASHION TO CARRY OUT ILLEGAL ACTIVITIES, THEN ON EITHER THE PROCEEDS OR THE USE, THEY WILL ATTEMPT TO TAKE THOSE PIECES OF PROPERTY.

THAT WHICH HE RAISES, IF THERE'S SOME LEGITIMATE BASIS WITHIN OUR SYSTEM OF JUSTICE TO DEAL WITH THAT, THEY WILL HAVE THAT OPPORTUNITY. BUT WE'RE TALKING ABOUT PUNISHMENT, WE'RE TALKING ABOUT PUNISHMENT. AND I SUGGEST TO THE COURT THAT IN TERMS OF PUNISHMENT, IT'S ENOUGH. THE USE OF THE WORD "ENOUGH" ISN'T ADEQUATE, BUT THAT'S ALL I CAN COME UP WITH AT THE MOMENT, AND I WOULD ASK THE COURT NOT TO DO THAT.

THE COURT: CONGRESS HAS TAKEN AN APPROACH IN RECENT YEARS THAT DEMONSTRATES AND SHOWS ITS DISDAIN FOR CERTAIN CRIMINAL OFFENSES AND IT'S COMPLETELY REVISED THE SENTENCING PROCESS IN RECENT YEARS, AS HE ALLUDED TO EARLIER, PART OF WHICH IS FOR THE PURPOSE OF PUNISHING A DEFENDANT, SOME OF WHICH IS TO DEACTIVATE A DEFENDANT, REMOVE HIM FROM SOCIETY AND VIOLATING THE LAW, AND PART OF WHICH IS TO TRY TO RETURN PARTIES TO THEIR PREVIOUS STATE;

THAT IS, BY RESTITUTION, WHICH THERE'S NO RESTITUTION BEING MADE IN THIS CASE; OR BY OTHERWISE NOT ALLOWING A CRIMINAL DEFENDANT TO RETAIN THEIR [p. 95] ILL-GOTTEN GAINS, AND IN MY JUDGMENT THAT'S PART OF WHAT LARGE FINES ARE AIMED AT. WHEN CONGRESS PUTS FOUR MILLION DOLLARS AS THE MAXIMUM FINE RANGE, IT COULDN'T BE FOR ANY OTHER PURPOSE, IN MY JUDGMENT, BUT TO ALLOW THE PUBLIC TO PUT THE PARTIES BACK WHERE THEY WERE.

IT IS DIFFICULT, GIVEN THE MAN'S AGE, AND OF COURSE HE'S ALMOST AS OLD AS I AM. AND I LOOK AT A PERIOD WHICH HE MUST SERVE AND I CAN'T LOOK THAT FAR INTO THE FUTURE. I CAN LOOK BACKWARDS AND SEE WHAT THAT TIME MEANS AND IT'S A VERY SIGNIFICANT PART OF ONE'S LIFE. BUT IN THIS PARTICULAR INSTANCE, AS SYMPATHETIC AS ONE MIGHT WANT TO BE, WHEN YOU LOOK AT WHAT'S NOW BECOME A STANDARD IN THIS COUNTRY, THE STATES TALK ABOUT IT AND THE FEDERAL GOVERNMENT TALKS ABOUT WHETHER IT BE TWO STRIKES OR THREE STRIKES, BUT THEY'VE GOT ALL OF THESE PROGRAMS AND YOU'RE OUT. HE QUALIFIES. HE HAS THREE PRIOR FELONY CONVICTIONS, TWO OF WHICH ARE MOST LIKELY RELATED. BUT THE INDICATION IS THAT MOST OF HIS ADULT LIFE HE'S BEEN INVOLVED IN CRIMINAL ACTIVITY AND THE TYPE OF CRIMINAL ACTIVITY THAT IS DESIGNED IN MAKING MONEY, NOT JUST CRIMES OF PASSION OR DISPUTES, BUT AT CRIMES OF MAKING MONEY; THAT IS, ILLEGAL LIQUOR, STEALING CARS OR DEALING IN STOLEN

CARS OR IN DEALING WITH DRUGS, ALL OF WHICH RELATES TO GREED AND PROVIDING AND ENHANCING ONE'S FAMILY'S STATUS, FINANCIAL STATUS IN LIFE.

I GUESS THIS IS THE TIME FOR THE COURT TO IMPOSE THE [p. 96] SENTENCE, AND THE COURT WILL. I TRIED TO REVIEW EVERYTHING THAT WAS HERE BEFORE I DID SO. SO, I'LL IMPOSE SENTENCE AS TO THE DEFENDANT, ROBERT WINFORD HOWARD. IN CASE NUMBER 93-14, ON THE FINDING OF THE VERDICT OF THE JURY FINDING THE DEFENDANT GUILTY AS TO COUNTS 1 AND 2 OF THE INDICTMENT, IT IS ADJUDGED THE DEFENDANT'S FOUND GUILTY OF COUNTS 1 AND 2 OF THE INDICTMENT AND PURSUANT TO THE SENTENCING REFORM ACT OF 1984 IT'S THE JUDGMENT OF THE COURT THAT THE DEFENDANT IS HEREBY COMMITTED TO THE CUSTODY OF THE BUREAU OF PRISONS TO BE IMPRISONED FOR A TERM OF 360 MONTHS ON EACH COUNT, TO BE SERVED CONCURRENTLY.

IT'S FURTHER ORDERED THAT THE DEFENDANT PAY TO THE UNITED STATES A TOTAL FINE OF TWO MILLION DOLLARS, CONSISTING OF ONE MILLION DOLLARS ON COUNT 1, ONE MILLION DOLLARS ON COUNT 2. IT IS FURTHER ORDERED THE DEFENDANT PAY THE UNITED STATES A SPECIAL ASSESSMENT OF $100.

IN THE EVENT OF AND UPON RELEASE FROM IMPRISONMENT, THE DEFENDANT SHALL BE PLACED ON SUPERVISED RELEASE FOR A TERM OF FIVE YEARS. THIS TERM OF COURSE WILL CONSIST

OF FIVE YEARS ON EACH OF COUNTS 1 AND 2 AND SHALL RUN CONCURRENTLY.

WITHIN 72 HOURS OF RELEASE FROM CUSTODY, IF THAT SHOULD OCCUR, THE DEFENDANT SHALL REPORT IN PERSON TO THE PROBATION OFFICE IN THE DISTRICT TO WHICH THE DEFENDANT IS RELEASED. WHILE ON SUPERVISED RELEASE THE DEFENDANT SHALL NOT COMMIT ANOTHER FEDERAL STATE OR LOCAL CRIME, SHALL COMPLY WITH

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* * *

[p. 1089] MR. RITCHIE: FIVE MINUTES. I DON'T THINK MORE THAN THAT. DO YOU WANT ME TO GO OUTSIDE?

THE COURT: ALL RIGHT, YOU MAY RESUME YOUR MOTION.

MR. RITCHIE: THANK YOU, SIR. IF IT PLEASE THE COURT, THE COURT MAY RECALL THAT AT THE TIME WE DISCUSSED THESE MATTERS ON FRIDAY, AND AGAIN ON MONDAY MORNING, WE RAISED THE ISSUE OF WHETHER OR NOT THE PROSECUTION WAS ATTEMPTING TO AMEND THE INDICTMENT OR EXPAND THE ALLEGATIONS DEALING WITH THE OFFENSES AGAINST THE DEFENDANT IN THIS CASE, AND WE PARTICULARLY RAISED THE ISSUE OF WHETHER OR NOT THE PROSECUTION WAS ATTEMPTING TO EXPAND THE INDICTMENT BY THE ALLEGATIONS RELATING TO A CONSPIRACY INVOLVING A SUBSTANCE WHICH WAS NOT ALLEGED IN THE ORIGINAL INDICTMENT; THAT IS, AMPHETAMINES, AND THE ADDITION OF SOME PEOPLE INTO – AS FAR AS THE IDENTITY OF CO-CONSPIRATORS WAS CONCERNED, TO INVOLVE SOME PEOPLE WHO WERE UNKNOWN AND UNNAMED OR AT LEAST SOME OF WHOM WERE TOTALLY UNKNOWN AND SOME WERE UNNAMED IN THE ORIGINAL ALLEGATIONS IN THE INDICTMENT.

IF I UNDERSTOOD THE COURT'S RULING CORRECTLY AT THAT TIME, BOTH IN OUR DISCUSSION

FRIDAY AFTERNOON AND AGAIN AT THE CONFERENCE, CHAMBERS CONFERENCE, ON MONDAY MORNING, IT WAS THAT THE ONLY WAY THAT AMPHETAMINE WAS GOING TO COME INTO THE TRIAL WAS THAT AMPHETAMINE WAS USED AS CUT. I REMEMBER WE HAD SOME RATHER DETAILED DISCUSSION ABOUT THE DIFFERENT THINGS THAT WERE USED TO CUT METHAMPHETAMINES AND THAT IN THIS [p. 1090] SITUATION THERE WAS GOING TO BE SOME PROOF THAT AMPHETAMINE WAS USED IN PLACE OF INOSITOL AND VITABLEND OR WHATEVER OTHER CUT WAS MENTIONED AT THAT TIME.

WHAT HAS HAPPENED HERE IS WHAT WE WERE AFRAID MIGHT BE THE RESULT OF THE EXPANSION OR AMENDMENT OF THE INDICTMENT IN THIS PARTICULAR, IN THAT WHAT WE NOW HAVE IS APPARENTLY AN ENTIRELY SEPARATE UNCHARGED, UNINDICTED CONSPIRACY THAT RELATES TO UP TO 100 TO 125 POUNDS OF AMPHETAMINE, APPARENTLY MANUFACTURED; DISTRIBUTED TO, THE TESTIMONY IS, MR. ROBERT W. HOWARD AND MR. RAY ALEXANDER OVER A PERIOD OF MONTHS, IF NOT YEARS. THAT, FROM WHAT I UNDERSTAND, HAS NOTHING TO DO WITH THE METHAMPHETAMINE CONSPIRACY, ALLEGATIONS OF CONSPIRACY.

THE COURT WILL NOTE IN PARAGRAPH 2-A OF THE THIRD BILL OF PARTICULARS WHERE THE NAME NOAH RAY ALEXANDER IS MENTIONED IN THIS REGARD. HIS NAME IS LISTED UNDER THE METHAMPHETAMINE CONSPIRACY. WHEN MR. KILLINGSWORTH'S NAME IS MENTIONED IN COUNT

2, WHICH IS A METHAMPHETAMINE CONSPIRACY COUNT, IT IS SHOWN AS RICKY KILLINGSWORTH, CHARGING THAT HE WAS A CO-CONSPIRATOR IN THE METHAMPHETAMINE CONSPIRACY.

OBVIOUSLY, YOUR HONOR, FROM THE STANDPOINT OF DUE PROCESS, WE'RE TALKING ABOUT NOTICE AND THE ADEQUACY OF NOTICE AND THE OPPORTUNITY TO PREPARE TO DEFEND. THE NOTICE, AS THIS COURT WELL KNOWS, IS GIVEN IN TERMS OF THE ALLEGATIONS IN THE INDICTMENT. AN INDICTMENT MAY BE EXPLAINED, IF YOU WILL, OR PARTICULARIZED BY MEANS OF A BILL OF PARTICULARS, BUT IT [p. 1091] CANNOT BE AMENDED AND IT CANNOT BE EXPANDED. WHAT WE, I RESPECTFULLY SUGGEST, HAVE HERE IS A RATHER BROAD EXPANSION OF THE CHARGES AGAINST MR. HOWARD AND WE HAVE THE INTERJECTION OF OFFENSES WHICH WERE NOT INCLUDED IN THE ORIGINAL INDICTMENT AND TO WHICH WE HAVE NOT BEEN ON NOTICE TO DEFEND, SO WE RESPECTFULLY MOVE THE COURT TO DECLARE A MISTRIAL ON THIS INDICTMENT. IF THE GOVERNMENT SEES FIT TO GO FORWARD WITH AN INDICTMENT WHICH DOES COMPLY WITH THE REQUIREMENTS OF DUE PROCESS, THEN OBVIOUSLY WE WOULD COME BACK AND MEET THAT INDICTMENT.

THE COURT: MR. MOYE.

MR. MOYE: YOUR HONOR, THE ADEQUACY OF NOTICE IS MORE THAN ADEQUATE. WE'VE LAID OUT IN THE INDICTMENT MR. KILLINGSWORTH'S NAME AS AN UNINDICTED CO-CONSPIRATOR AND

SPECIFICALLY ALLEGED THE MONROE, LOUISIANA, MATTER AS AN OVERT ACT OF THE CONSPIRACY IN WHICH THERE WAS AMPHETAMINE AND METH-AMPHETAMINE SEIZED, AND THERE HAS BEEN AMPLE DISCOVERY PROVIDED ABOUT THAT PARTICULAR TRANSACTION.

ADDITIONALLY, WE PROVIDED A LONG TIME AGO IN DISCOVERY THE LAB REPORTS ABOUT WHICH MR. CLARK TESTIFIED ON YESTERDAY, THE LAB REPORTS THAT WERE THE RESULT OF THE ANALYSIS OF THE SUBSTANCES THAT CAME FROM MR. WATSON, WHERE YOU WILL RECALL MR. CLARK TESTIFIED HOW UNUSUAL IT WAS FOR HIM TO FIND – IN HIS 22 YEARS HE'D NEVER SEEN IT – TO FIND METHAMPHETAMINE AND AMPHETAMINE MIXED TOGETHER, AND FROM HIS [p. 1092] CONCLUSION, IT HAD TO HAVE OCCURRED IN TWO SEPARATE SYNTHESES AND THEN A MIXING, THAT IT DID NOT OCCUR NATURALLY AS PART OF THE SAME SYNTHESIS.

I THINK THAT IN THE FIRST PLACE MR. KILLINGSWORTH'S TESTIMONY ABOUT THE MONROE, LOUISIANA, MATTER IS PART OF THE CONSPIRACY CLEARLY ALLEGED IN THE INDICTMENT, AND THERE WAS MORE THAN ADEQUATE NOTICE, BOTH IN THE DISCOVERY AND IN THE INDICTMENT, ABOUT THE INVOLVEMENT OF AMPHETAMINE IN THIS CASE.

THE COURT: WELL, THE INDICTMENT DOESN'T ALLEGE AMPHETAMINE I DON'T BELIEVE ANYWHERE.

MR. MOYE: I DON'T BELIEVE IT DOES, BUT WE PROVIDED –

THE COURT: THE BILL OF PARTICULARS BROUGHT IT OUT, AND AT THAT TELEPHONE CONFERENCE WITH COUNSEL ON –

MR. RITCHIE: FRIDAY.

THE COURT: LAST WEEK. A WEEK AGO TODAY I GUESS.

MR. RITCHIE: RIGHT.

THE COURT: WAS WHEN THE EVIDENCE CAME IN THAT IT HAD BEEN APPARENTLY USED AS A CUTTING AGENT. IN LISTENING TO THIS TESTIMONY, I THOUGHT TO MYSELF THAT SURE WAS A LOT OF CUTTING AGENT THAT WAS BEING TESTIFIED ABOUT, BUT –

MR. MOYE: WELL, YOU UNDERSTAND, YOUR HONOR, THE –

THE COURT: I FRANKLY IN MY OWN MIND CAME TO A DIFFERENT CONCLUSION IN REGARD TO IT, BUT THAT MAY OR MAY NOT BE VALID. I WAS LISTENING TO THAT BECAUSE IT KNEW THAT IT – [p. 1093] THE TESTIMONY SEEMED LIKE IT WAS A GREATER AMOUNT THAN I ASSUMED WE WERE GOING TO HAVE AS A RESULT OF THAT CUTTING AGENT, THAT AMOUNT THAT WAS SEIZED OR THOUGHT TO BE A CUTTING AGENT OR AN ADDITIVE.

MR. RITCHIE: CAN I MAKE A BRIEF ADDITIONAL COMMENT, YOUR HONOR?

THE COURT: YES.

MR. RITCHIE: YOUR HONOR, THE OVERT ACT ON PAGE 11 OF THE INDICTMENT IS: ON OR ABOUT MARCH 14, 1989, CO-CONSPIRATOR RICKY P. KILLINGSWORTH POSSESSED A QUANTITY OF METHAMPHETAMINE, SCHEDULE II CONTROLLED SUBSTANCE, STATE OF LOUISIANA, WITH THE ATTEMPT TO TRANSPORT SAID CONTROLLED SUBSTANCE IN INTERSTATE COMMERCE, ET CETERA, TO ROBERT WINFORD HOWARD.

WHAT WE HAVE HERE AND LAID OUT IN GREAT DETAIL UNDER THE UMBRELLA OF THE THIRD BILL OF PARTICULARS IS A SERIES OF MANY, MANY TRIPS AS I UNDERSTAND IT. IT STARTED EARLY 1987, MORE THAN TWO YEARS BEFORE THIS OVERT ACT AND THIS ALLEGED TRIP IN LOUISIANA, DEALING WITH NOTHING TO DO WITH METHAMPHETAMINE AND NOTHING TO DO WITH ANYTHING BUT AMPHETAMINE BEING BROUGHT. THE FIRST WAS THREE POUNDS, I THINK HE SAID, FOR $30,000, AND THEN WE GOT TO I THINK FIVE – I'VE FORGOTTEN THE NUMBERS. FIVE AND A HALF POUNDS, SEVEN AND A HALF POUNDS, AND THEN –

THE COURT: 15 POUNDS.

[p. 1094] MR. RITCHIE: 15 POUNDS, AND THERE WERE A WHOLE – THAT'S ENOUGH FOR A WHOLE SEPARATE TRIAL. I MEAN, A LOT OF PEOPLE HAVE BEEN PROSECUTED ON A LOT LESS THAN THAT AND HAD A WHOLE TRIAL OVER IT, AND YET IT'S BEEN INTERJECTED IN HERE, AND I SUGGEST MOST RESPECTFULLY, WITH EXTREME PREJUDICE

TO THE ABILITY TO DEFEND THE CHARGES THAT WE CAME HERE TO DEFEND. I SIMPLY THINK IT'S A MATTER OF FAIRNESS, WHICH IS WHAT DUE PROCESS IS ALL ABOUT ANYWAY.

THE COURT: DO YOU HAVE A COPY OF LINDA ARMSTRONG'S STIPULATION?

MR. MOYE: I MAY HAVE A COPY, YOUR HONOR.

I APOLOGIZE, YOUR HONOR. I DO NOT HAVE A COPY.

MR. RITCHIE: I HAVE A COPY OF IT. YOUR HONOR, THIS ONLY RELATES TO THE LOUISIANA SEIZURE.

THE COURT: WELL, THAT'S RIGHT, BUT I WANT TO SEE WHAT IT SAYS.

MR. RITCHIE: YES. SURELY, SURELY, YOUR HONOR. IT SURELY DOES.

THE COURT: ALL RIGHT, THAT'S WHAT I THOUGHT. THE AMPHETAMINE CAME OUT IN REGARD TO THAT.

MR. RITCHIE: THAT'S RIGHT, YOUR HONOR, BUT –

THE COURT: AND METHAMPHETAMINE, BOTH.

MR. RITCHIE: THIS ONLY RELATED, AS I UNDERSTOOD IT, TO THAT MARCH 14, 1989.

THE COURT: THAT ONE TRANSACTION, THAT ONE INCIDENT, [p. 1095] THAT'S RIGHT.

MR. RITCHIE: YES, SIR.

THE COURT: BUT THAT'S A DIFFERENT ONE THAN WHEN WE HAD THE SEIZURE UP HERE. AND WHEN IT WAS ANALYZED, IT WAS FOUND TO BE EIGHT PERCENT AMPHETAMINE.

MR. MOYE: AND ABOUT THREE PERCENT METHAMPHETAMINE.

MR. RITCHIE: OBVIOUSLY WE ENTERED INTO THIS STIPULATION ONLY AS IT RELATED TO THE MARCH –

THE COURT: WELL –

MR. RITCHIE: AND THIS WAS AFTER YOUR HONOR HAD RULED THAT YOU WERE GOING TO LET THAT OVERT ACT.

THE COURT: WELL, THAT STIPULATION INDICATES THAT THEY WERE BOTH BEING TRANSFERRED, TRANSPORTED; THAT IS, METHAMPHETAMINE AND AMPHETAMINE THERE, IN SEPARATE PACKAGES.

MR. RITCHIE: I WOULD NOT BE RAISING THIS MOTION IF ALL WE WERE DEALING WITH IS A MARCH, '89 –

THE COURT: I UNDERSTAND, I UNDERSTAND, BUT I'M ANALYZING WHAT ROLE AND WHAT – I'LL DENY THE MOTION. I DO NOT THINK THAT IT'S INCONSISTENT WITH WHAT WE DISCUSSED THE OTHER DAY. THERE'S MORE OF IT THAN I THOUGHT THERE WOULD BE, BUT THAT'S STILL WITHIN THE POSSIBLE PARAMETERS OF WHAT

WE DEALT WITH. I'LL OVERRULE THE OBJECTION. I'LL JUST OVERRULE THE OBJECTION, DENY THE MOTION.

MR. RITCHIE: THANK YOU VERY MUCH, YOUR HONOR. AND, YOUR HONOR, MOST RESPECTFULLY –

[p. 1096] THE COURT: I SAID I OVERRULE THE OBJECTION, BUT IT WAS A MOTION, SO I DENY THE MOTION FOR MISTRIAL.

MR. RITCHIE: MAY IT PLEASE THE COURT, ALTHOUGH THERE'S NOTHING THAT NEEDS TO BE DONE AT THIS TIME, WE WOULD ASK FOR 12(E) FINDINGS IN REGARD TO THE ISSUES RAISED BY THE MOTION TO BE PUT IN THE RECORD FOR THE MATTERS INCLUDED AS TO BOTH THE – IN VIEW OF THIS DEVELOPMENT, BOTH AS TO THE MOTION TO STRIKE MADE ON FRIDAY AND THE MOTION FOR A MISTRIAL TODAY.

THE COURT: ADDITIONALLY, PROBABLY THIS EVIDENCE COULD BE ADMITTED UNDER ANOTHER THEORY THAT MR. MOYE DIDN'T ARGUE HERE BUT HE'S ARGUED EARLIER. HE DIDN'T ARGUE IT TODAY; BUT THAT IS, SIMILAR TRANSACTIONS. I THINK THE SIMILAR TRANSACTIONS RULE DOES NOT HAVE TO NECESSARILY BE THE SAME CONTROLLED SUBSTANCE. IN OTHER WORDS, YOU COULD BE TRYING A COCAINE CASE AND INTRODUCE EVIDENCE OF AMPHETAMINE OR METHAMPHETAMINE OR SOME OTHER CONTROLLED SUBSTANCE UNDER SOME –

MR. RITCHIE: YOUR HONOR'S SPEAKING OF 404(B)?

THE COURT: YES.

MR. RITCHIE: YOUR HONOR, IN THE EVENT THAT THE COURT DECIDES TO BASE ITS RULING – AS I TOLD YOU YESTERDAY, I NEVER ARGUE WITH THE COURT AND I'M NOT GOING TO ARGUE NOW, BUT LET ME MAKE THIS REQUEST, IF I MAY. IF THE COURT ULTIMATELY DECIDES IT WOULD ADMIT THIS EVIDENCE UNDER 404(B), WE WOULD LIKEWISE ASK FOR FINDINGS AS TO WHICH EXCEPTION UNDER 404(B) [p. 1097] THIS EVIDENCE WOULD BE ADMISSIBLE, AND IF IT DEALS WITH – WHETHER IT DEALS WITH OPPORTUNITY, INTENT, PREPARATION, PLAN, KNOWLEDGE, IDENTITY OR ABSENCE OF MISTAKE, AND THE BASIS FOR INCLUDING IT WITHIN ONE OR MORE OF THOSE EXCEPTIONS AS A PART OF THE RECORD JUST TO COMPLETE THE RECORD.

THE COURT: I UNDERSTAND. OF COURSE, IT'S ALREADY BEEN ADMITTED WITHOUT OBJECTION.

MR. RITCHIE: I UNDERSTAND, YOUR HONOR.

THE COURT: BUT NOW WE'RE DEALING WITH THE MOTION FOR MISTRIAL, WHICH I'VE DENIED.

MR. RITCHIE: THAT'S CORRECT.

THE COURT: ALL RIGHT. BRING THE JURY – HOW LONG DO YOU ANTICIPATE YOUR CROSS-EXAMINATION OF THIS WITNESS WILL TAKE?

MR. FELS: PROBABLY HALF AN HOUR, YOUR HONOR.

THE COURT: ALL RIGHT, BRING THE JURY DOWN.

ARE YOU HANDLING IT, MR. FELS?

MR. FELS: YES, SIR.

THE COURT: ALL RIGHT, SIR.

(JURY RETURNED)

THE COURT: YOU MAY CROSS-EXAMINE, MR. FELS.

MR. FELS: THANK YOU, YOUR HONOR.

CROSS-EXAMINATION OF RICKY KILLINGSWORTH BY MR. FELS:

Q. MR. KILLINGSWORTH, YOU WERE ARRESTED ON MARCH THE 14TH,

* * *

Supreme Court, U.S.
FILED
OCT 11 1996
CLERK

No. 95-1975

In the Supreme Court of the United States

OCTOBER TERM, 1996

ROBERT W. HOWARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the issuance of a warrant for petitioner's arrest on felony drug charges in this country authorized the Secretary of State to revoke his passport, subject to petitioner's opportunity for a post-revocation hearing.

2. Whether the government's third bill of particulars, which stated that petitioner had trafficked in amphetamine as part of the charged conspiracy to distribute methamphetamine, constructively amended the indictment.

3. Whether the district court considered petitioner's ability to pay the $2,000,000 fine that the court imposed.

4. Whether the disagreement among certain courts of appeals respecting the correct classification of various forms of methamphetamine under the Sentencing Guidelines violated petitioner's right to due process.

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OPINION BELOW

The order of the court of appeals (Pet. App. 1) is unpublished, but the decision is noted at 81 F.3d 177 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 14, 1996. The petition for a writ of certiorari was filed on June 7, 1996, and was entered on the docket on June 12, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted on one count of conspiring to possess marijuana with intent to distribute it, and one count of conspiring to possess methamphetamine with intent to distribute it, both in violation of 21 U.S.C. 846.[1] He was sentenced to 360 months' imprisonment and was fined $2,000,000. The court of appeals affirmed. Pet. App. 1.

1. The evidence at trial, the sufficiency of which is not in dispute, showed that petitioner was actively engaged in the interstate distribution of marijuana. Petitioner initially obtained his marijuana from co-conspirator Tom Fisher, who lived in Oklahoma, and sold it to various persons in Georgia and Tennessee. After Fisher's home was searched pursuant to a warrant in May 1989, petitioner sought a new source. In early 1990, petitioner's partner and co-conspirator, James Gregory Hutcheson, arranged for a joint purchase of marijuana imported from Mexico by co-conspirator Gilberto Salinas. Between March and August 1990, Salinas's organization made three deliveries, totaling some 8,000 pounds of marijuana, to a junkyard near Hutcheson's home in southeast Georgia. Hutcheson kept some of the marijuana but distributed the rest at petitioner's direction. Gov't C.A. Br. 4-6.

Petitioner also trafficked in methamphetamine. Over a number of years, he distributed methamphetamine to various persons, including co-conspirators George Watson and J.T. Millwood, who then sold

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[1] Petitioner was acquitted of conspiring to possess cocaine with intent to distribute it (21 U.S.C. 846).

it to others. Laboratory analysis of methamphetamine seized from Watson showed that it had been cut with amphetamine. Co-conspirator Ricky Killingsworth had provided petitioner with some 125 pounds of amphetamine over almost a two-year period beginning in the spring of 1987. Gov't C.A. Br. 6-7.

2. In May 1992, Hutcheson was indicted. In December 1992, he advised petitioner that he was going to cooperate with the government, because he was facing a life sentence. Petitioner, who had planned to travel to the Philippines in January 1993, quickly changed his reservations and flew to the Philippines on December 22, 1992. He remained there until he was deported in January 1994. Gov't C.A. Br. 8.

In July 1993, petitioner was indicted. After a warrant issued for petitioner's arrest, the Secretary of State revoked his passport pursuant to 22 C.F.R. 51.72(a).[2] On January 20, 1994, the Department of State notified the government of the Republic of the Philippines that petitioner had been indicted on federal narcotics charges in this country, that a felony warrant had been issued for his arrest, and that his passport had been revoked. The State Department requested that the Philippines government detain

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[2] Section 51.72(a) provides that "[a] passport may be revoked or restricted or limited where * * * [t]he national would not be entitled to issuance of a new passport under § 51.70." Section 51.70(a)(1), in turn, provides that "[a] passport, except for direct return to the United States, shall not be issued in any case in which the Secretary of State determines or is informed by competent authority that * * * [t]he applicant is the subject of an outstanding Federal warrant of arrest for a felony."

petitioner and deport him for trial in the United States. Gov't C.A. Br. 9.

On Friday, January 28, 1994, petitioner was arrested by Philippines authorities as an undocumented and overstaying alien. The following day, the U.S. Embassy provided petitioner with notice of the revocation of his passport and of his right, under 22 C.F.R. 51.80, to seek a hearing on the revocation.[3] Petitioner did not request a hearing. On Monday, January 31, 1994, petitioner was deported from the Philippines and forcibly escorted back to the United States by two Philippines agents. Gov't C.A. Br. 9-10.

3. Before trial, petitioner moved to suppress certain statements that he had made on his return flight to the United States, as well as certain items that were seized from his person after he arrived in this country. A magistrate judge recommended that petitioner's motion be denied. The magistrate judge reasoned that, because petitioner was not returned to this country in violation of his constitutional rights, there was no basis for suppressing his statements or evidence obtained after his arrest. Magistrate Judge's Order, Report and Recommendation 12 (Dec. 27, 1994). The district court adopted the Magistrate Judge's Recommendation and denied petitioner's motion to suppress. Pet. App. 14.

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[3] Section 51.81 provides that "[a] person who has been the subject of an adverse action with respect to his or her right to receive or use a passport shall be entitled, upon request made within 60 days after receipt of notice of such adverse action, to require the Department [of State] or the appropriate Foreign Service post, as the case may be, to establish the basis for its action in a proceeding before a hearing officer." 22 C.F.R. 51.81.

4. Petitioner renewed his suppression claim on appeal. He also argued that the government impermissibly amended the indictment when, in a bill of particulars, the government averred that petitioner used amphetamine in his methamphetamine distribution scheme. Petitioner also challenged his fine and term of incarceration. The court of appeals affirmed by judgment order. Pet. App. 1.

ARGUMENT

1. Petitioner argues (Pet. 5-12) that the Secretary of State had no authority to revoke his passport while he was travelling overseas on the ground that a warrant had been issued for his arrest in this country, and he contends further that the revocation of his passport without a prior hearing violated his Fifth Amendment right to due process. The court of appeals correctly rejected both of those arguments, and those holdings do not merit further review.

a. "A passport is, in a sense, a letter of introduction in which the issuing sovereign vouches for the bearer and requests other sovereigns to aid the bearer." *Haig* v. *Agee*, 453 U.S. 280, 292 (1981). It has long been considered "a document, which, from its nature and object, is addressed to foreign powers; purporting only to be a request, that the bearer of it may pass safely and freely; and is to be considered rather in the character of a political document." *Urtetiqui* v. *D'Arcy*, 34 U.S. (9 Pet.) 692, 698 (1835). Although the denial or revocation of a passport "undeniably curtails travel, * * * the freedom to travel abroad with a 'letter of introduction' in the form of a passport issued by the sovereign is subordinate to national security and foreign policy considerations." *Haig* v. *Agee*, 453 U.S. at 306.

In *Kent* v. *Dulles*, 357 U.S. 116 (1958), the Court observed that passports have long been denied in circumstances that implicate significant sovereign interests, including where "the applicant [i]s participating in illegal conduct, [or] trying to escape the toils of the law." *Id.* at 127. In *Haig*, the Court concluded that, if the Secretary of State "may deny a passport for a certain reason, he may revoke a passport on the same ground." 453 U.S. at 291. The Secretary of State's regulations track those established principles: Section 51.70 provides that a person with an outstanding federal felony warrant of arrest "shall not be issued" a passport (22 U.S.C. 51.70(a)(1)); and Section 51.72 authorizes the Secretary of State to revoke a passport where the individual "would not be entitled to issuance of a new passport under § 51.70" (22 C.F.R. 51.72(a)).

In this case, petitioner "sought to escape the toils of the law" by taking refuge in the Philippines. Because he was the object of an outstanding arrest warrant stemming from his indictment on federal narcotics charges, he was not entitled to hold a passport, and his passport was correctly revoked.

b. Petitioner had no right to a hearing before the revocation of his passport. Where substantial sovereign interests are at stake, the government may take action—including summary revocation of a passport—"to ensure that the holder may not exploit the sponsorship of his travels by the United States." *Haig*, 453 U.S. at 309. Although this case does not involve an immediate threat to national security of the sort posed in *Haig*, the ability summarily to revoke a passport may be critical in circumstances like these to prevent a fugitive's escape from justice—a substantial, indeed compelling, governmen-

tal interest. *Kent*, 357 U.S. at 127. The issuance of a felony arrest warrant based on an indictment returned by a grand jury represents a charge of serious misconduct that often may justify prompt action, subject to a later hearing. *FDIC* v. *Mallen*, 486 U.S. 230, 240-241 (1988) (upholding constitutionality of banking agency's suspension of a bank officer upon his felony indictment, subject to a post-suspension hearing). Moreover, where, as here, the criminal charges themselves require the defendant to return to this country to face trial, revocation of a passport presents virtually no risk of an erroneous deprivation. In those circumstances, the opportunity for a prompt post-revocation hearing (see 22 C.F.R. 51.81) is more than adequate to protect the private interests at stake.

c. We are aware of only one other court of appeals decision that has involved a challenge to the revocation of a passport without a prior hearing—*Magnuson* v. *Baker*, 911 F.2d 330 (9th Cir. 1990). In *Magnuson*, the court of appeals took a narrower view of the power of the Secretary of State, but that case involved significantly different facts. The holder of the revoked passport, Charles Vernon Myers, claimed to be a United States citizen. In response to Myers' application, the Department of State initially determined that he was a citizen and granted him a passport. Several months later, the Immigration and Naturalization Service, which was attempting to deport Myers, objected to the issuance of his passport. The Department of State then informed Myers that the passport had been issued in error, and demanded that Myers return it. Myers requested a hearing on his claim to citizenship, but the State Department denied it. *Id.* at 331-332.

Myers filed suit in district court, claiming that the revocation of his passport violated 22 U.S.C. 2705, which provides in part that a passport "shall have the same force and effect as proof of United States citizenship as certificates of naturalization or of citizenship issued by the Attorney General or by a court having naturalization jurisdiction." 911 F.2d at 336. The district court granted summary judgment in Myers' favor, and the court of appeals affirmed. The court of appeals concluded that Section 2705 limits the Secretary of State's power to revoke a passport to those reasons that would justify revocation of a certificate of naturalization or of citizenship, and that the holder must first be afforded an opportunity for a hearing. 911 F.2d at 334.

Although the court of appeals in *Magnuson* based its holding on statutory construction, its reasoning was influenced by the fact that the passport holder claimed to be a citizen who had a right to remain in this country. 911 F.2d at 335 n.10. Defenses to deportation based upon claims of citizenship have long been accorded special protection by the courts. See, *e.g.*, *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922) ("Jurisdiction in the executive to order deportation exists only if the person arrested is an alien."). Here, unlike in *Magnuson*, petitioner's citizenship *vel non* was not at issue, and he did not face deportation from this country. Petitioner, moreover, was indisputably the object of an outstanding arrest warrant, which under settled principles justified his return to this country. *Blackmer* v. *United States*, 284 U.S. 421, 437 (1932) ("[T]he United States possesses the power inherent in sovereignty to require the return to this country of a citizen, resident elsewhere, whenever the public interest requires, and to penalize in the

case of refusal."). Whatever limitations may attend the revocation of a passport in a case like *Magnuson* do not control the validity of the Secretary of State's actions in this case.

d. Finally, even if the Secretary of State's revocation of petitioner's passport were invalid, petitioner would have no right to suppress any evidence that resulted from his deportation by the Philippines government. The violation of statutes or regulations governing the revocation of a passport would not entitle petitioner to suppress evidence, where, as here, those provisions do not expressly require that remedy. See *United States* v. *Cacerers*, 440 U.S. 741 (1979). Nor, if the revocation of the passport without a prior hearing violated due process, would that violation warrant exclusion of the evidence obtained during and upon his return to this country. Absent proof of an actual injury, a violation of procedural due process provides no entitlement to substantive relief. See *Carey* v. *Piphus*, 435 U.S. 247, 266 (1976); see also *id.*, at 259 ("Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property."). Here, petitioner has not contended (and could not plausibly contend) that provision of a prior hearing would have affected the Secretary of State's determination to revoke his passport, or that the opportunity for a prior hearing would have otherwise prevented his return to this country. Indeed, although petitioner was advised of his right to a post-revocation hearing before his deportation from the Phillippines, he did not seek such a hearing. Without a showing that the absence of a prior hearing affected the revocation of his passport or his deportation from the Philippines, the claimed right to a prior hearing

can provide no basis for suppression of the evidence obtained in the course of petitioner's return to this country.

2. Petitioner argues (Pet. 12-15) that the government's third bill of particulars, which listed the amounts of various drugs that petitioner distributed and alleged, *inter alia*, that he had distributed at least 125 pounds of amphetamine, impermissibly amended the indictment. That is incorrect. The government's bill of particulars averred, and its proof at trial showed, that petitioner sold methamphetamine that had been mixed with substantial quantities of amphetamine. The co-conspirators' use of amphetamine as a cutting agent for methamphetamine was clearly admissible as evidence of petitioner's involvement in the methamphetamine conspiracy. Gov't C.A. Br. 31; Pet. App. 24-30. Petitioner could not have been surprised by that evidence, moreover, because he was given notice of the government's allegations in pretrial discovery. Gov't C.A. Br. 30.

Contrary to petitioner's argument (Pet. 14), the government's presentation of evidence of the use of amphetamine in the methamphetamine conspiracy did not create a risk of conviction for an uncharged offense. The third bill of particulars was not read to the jury (Pet. App. 15), and the jury was not otherwise permitted to convict petitioner on a charge of conspiring to possess *amphetamine* with intent to distribute it; rather, the charge presented to the jury was conspiracy to possess *methamphetamine* with intent to distribute it, and ample evidence was introduced to support petitioner's conviction of that offense.[4]

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[4] Petitioner's reliance on *United States* v. *Willoughby*, 27 F.3d 263 (7th Cir. 1994), is misplaced. In that case, the defen-

3. Petitioner argues (Pet. 15-21) that the $2,000,000 fine imposed by the district court was excessive because the court failed to consider petitioner's ability to pay the fine. Contrary to petitioner's argument, the court expressly found that petitioner had substantial, illegally-obtained assets, Gov't C.A. Br. 42-43, and the amount of the fine imposed by the court was supported by the evidence of petitioner's resources presented by the government at sentencing. The government showed that the farm on which petitioner lived was worth $250,000; that he owned a second farm and a store; that he disposed of other assets while in the Philippines; and that funds in the bank accounts of petitioner's defunct used car business exceeded the proceeds of car sales by $1.2 million. *Id.* at 43. Petitioner provided the Probation Officer with no information about his assets, and he introduced no evidence to rebut the government's proof at sentencing. *Id.* at 44-45. He therefore has no basis on which to complain about the fine.

Petitioner also errs in contending (Pet. 21) that the fine impermissibly punishes his spouse, by depriving her of marital assets on which she depends. The

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dant was charged in a bench trial with using or carrying a firearm during and in relation to the distribution of cocaine. 18 U.S.C. 924(c). The judge considered evidence linking the weapon to the defendant's possession of cocaine with intent to distribute it. Because the court of appeals found that the government had introduced no evidence linking the gun to the actual distribution of cocaine, it concluded that the admission of evidence linking possession of the gun generally to the defendant's drug trafficking activities had impermissibly broadened the indictment. 27 F.3d at 266-267. In this case, in contrast, there was abundant proof that petitioner engaged in a methamphetamine conspiracy and that he utilized amphetamine as part of that conspiracy.

district court found (Pet. App. 19-20) that petitioner was involved for "most of his adult life * * * in criminal activity and the type of criminal activity that is designed in making money; that is, illegal liquor, stealing cars or dealing in stolen cars or dealing with drugs, all of which relates to greed and providing and enhancing one's family status, financial status in life." Petitioner's spouse has no equity in retaining his ill-gotten gains.

4. Petitioner argues (Pet. 22-26) that the Sentencing Guidelines' treatment of various forms of methamphetamine is so confusing that it provides inadequate notice of potential sentences for methamphetamine-trafficking offenses. That argument is without merit.

Petitioner was on notice of the manner in which the Sentencing Guidelines would be applied in this case. The issue at petitioner's sentencing was whether 53 pounds of methamphetamine that the district court attributed to petitioner was "D" or "L" methamphetamine. Petitioner conceded that 8.8 grams of that methamphetamine was "D" methamphetamine; he contested the characterization of the remaining methamphetamine. Gov't C.A. Br. 47. Under Eleventh Circuit law applicable to petitioner's offense, the term "methamphetamine" in the Sentencing Guidelines encompasses all forms of that substance, except to the extent that the Guidelines specifically single out "L" methamphetamine. *United States* v. *Carroll*, 6 F.3d 735 (1993), cert. denied, 510 U.S. 1183 (1994). Consistent with that settled principle, the district court determined that all of the methamphetamine at issue in this case should be treated as "D" methamphetamine. See Pet. App. 16.

Contrary to petitioner's argument, any disagreement among various courts of appeals on the treatment of methamphetamine under the Sentencing Guidelines (Pet. 23-25) did not deprive him of due process. Moreover, where there is a need for clarification of the Guidelines, that task is appropriately reserved for the Sentencing Commission. *Braxton* v. *United States*, 500 U.S. 344, 348 (1991). The Sentencing Commission has recently amended the Guidelines by removing the lower penalties for L-methamphetamine from the Drug Equivalency Tables. See United States Sentencing Comm'n, *Federal Guidelines Manual*, App. C, amend. 518, at 817 (Nov. 1, 1995). As a result, L and D-methamphetamine are now treated the same, eliminating any question regarding the proper treatment of DL-methamphetamine. See *United States* v. *Watkins*, 912 F. Supp. 417, 419 n.4 (E.D. Ark. 1996). Any confusion regarding the proper treatment of DL-methamphetamine under prior versions of the Guidelines is of limited future consequence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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